No. 95-489

(13)

IN THE

Supreme Court of the United States

OCTOBER TERM 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE and DOUGLAS L. JONES, as Treasurer,

Petitioners,

—v.—

FEDERAL ELECTION COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AS AMICUS CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The Brennan Center for Justice is a partnership between law clerks who served Justice William Brennan, Jr., during his thirty-four years as an Associate Justice of the United States Supreme Court, and the faculty of New York University School of Law, designed to honor Justice Brennan. Before giving his blessing to the enterprise, Justice Brennan extracted a promise that the Brennan Center would function

[1] The parties have consented to the filing of this brief. Letters of consent will be lodged with the Clerk of the Court.

as a genuinely independent center of thought on significant legal issues affecting American life. He particularly insisted that no special deference be paid to his views, or to his opinions. Justice Brennan played no role in the formulation of this brief, or in the decision to file a brief in this case.

The Center's ideal is to unite the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist both courts and legislatures in developing practical solutions to difficult problems in areas of special concern to Justice Brennan. In keeping with Justice Brennan's legendary contributions to the law of American democracy, the Center has chosen to concentrate initially on a Democracy Project. The Brennan Center's initial effort at democratic law reform litigation resulted in the invalidation of unconstitutionally restrictive ballot access laws governing the Presidential primary process in New York State. *Rockefeller v. Powers*, No. 96-7173 (2nd Cir. Feb. 29, 1996). *Amicus* submits this brief in the hope that it will prove useful to the Court in considering the difficult First Amendment issues raised by efforts to regulate the financing of election campaigns.

STATEMENT OF THE CASE

In the Spring of 1986, the Colorado Republican Party made two important decisions. First, the local party decided to assign its entire federal spending ceiling for the forthcoming Senatorial election[2] to the national party pursuant to *FEC v. Democratic Senatorial Campaign Comm'n*, 454 U.S. 27 (1981). Next, the local party decided to sponsor negative advertising costing approximately $15,000 attacking the record of Tim Wirth, a probable Democratic candidate for the

[2] Under 2 U.S.C. section 441a(d)(3), the Colorado Republican party was authorized to spend approximately 4.4 cents per voter in support of candidates for the Senate in 1986, or approximately $145,000. The local party elected to assign the full amount to the national party.

Senate. Since the assignment to the national party had exhausted the local party's spending authority, the FEC alleged that the $15,000 negative advertisement placed the local party over the spending limits set by Section 441a(d). The District Court ruled that the advertisement did not include "express advocacy" of the election or defeat of a candidate and, thus, fell outside the coverage of the FECA. The Tenth Circuit reversed, finding that the advertisement was an "electioneering message" falling within the Act's coverage. The Circuit rejected a First Amendment challenge to the Act's spending limits, holding that the spending limits on local political parties imposed by Section 441a(d) are justified as an effort to prevent corruption and to equalize access to the electoral process.

SUMMARY OF ARGUMENT

Tension exists between the First Amendment right of individuals to spend money in an effort to elect a favored candidate,[3] and the moral imperative of an elected official to be

[3] See, Eg., *Buckley v. Valeo*, 424 U.S. 1 (1976) (invalidating ceilings on independent campaign expenditures by individuals and candidates); *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) (invalidating ceiling on independent campaign expenditures by PAC's); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (invalidating ban on corporate campaign expenditures by non-profit corporation "akin to [a] voluntary political association"). See also *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) (invalidating $250 ceiling on contributions to committees formed to support or oppose ballot initiatives); *Meyer v. Grant*, 486 U.S. 414 (1988) (invalidating ban on paid petition circulators for ballot initiative); *Brown v. Hartlage*, 456 U.S. 45 (1982) (invalidating ban on campaign promise to take salary cut). But see *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (upholding ban on corporate independent expenditures in support of state and local candidates); *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) (upholding $5,000 ceiling on contributions from unincorporated associations to multi-candidate political action committees); *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) (upholding ban on solicitation of general public by corporate PAC's;

more than a mere conduit for the wishes of her most vocal (or powerful) constituents.[4] In a world where money is indispensable to electoral success[5], the relentless need to appeal to prospective donors may render it extremely difficult for a candidate or an elected representative to exercise, and to appear to exercise, the independent choice on which the moral integrity of democracy depends. A political system in which candidates must continuously, and publicly, appeal to self-interested donors in order to mount a credible electoral campaign risks losing the confidence and respect of the vast bulk of the electorate who lack the funds to bid in the electoral auction.

For the past twenty years, Congress has sought to safeguard both the First Amendment right to spend money in support of favored candidates, and the democratic imperative of candidate independence, by closely regulating contributions to federal candidates, while leaving independent and candidate expenditures essentially unregulated.[6] Petitioner's constitutional argument threatens to open a massive contribution loophole through which corporations, labor unions and wealthy donors, barred from making contributions directly to candidates for federal office, can indirectly exercise the real and perceived leverage over candidates explicitly denied to them by the 1974 Act by exploiting the influence acquired through enormous "soft money" contributions to local political parties. In a world in which the soft money loophole did not exist, local political parties might well play a more constructive role in the financing of federal elections. But local political parties cannot have it both ways. They cannot choose to be awash in cash from soft money donors who are forbidden to contribute to a federal election campaign, while simultaneously demanding to be permitted to disburse limitless amounts of money to candidates for federal office.

Moreover, by highlighting the questionable distinctions and elaborate regulations required by *Buckley*, this appeal reveals that the analytic framework established by *Buckley v. Valeo* is inadequate to the task of dealing with the complexities of campaign financing. The conventional *Buckley* analysis, which increases the difficulty of raising money, while making it impossible to control expenditures, has created an unacceptable *status quo*. With the benefit of twenty years of hindsight, *amicus* urges the Court to reconsider the bright-line distinction between contributions and expenditures established in *Buckley*, and to recognize that Congress may regulate every phase of the campaign finance process when it is demonstrably necessary to protect against corruption, or to safeguard both the reality and the appearance of an elected official's ability to exercise independent moral choice.

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solicitation confined to shareholders, executives, and administrative personnel).

[4] See generally, Edmund Burke, *Address to the Electors of Bristol* (1774) (reprinted in Conor Cruise O'Brien, *The Great Melody* (1992) at 74-75; Abraham Lincoln, in the *Lincoln-Douglas Debates* (1854), described in David Herbert Donald, *Lincoln*, at 173-178. See also *Federalist* 10 (Madison).

[5] For the intense relationship between money and electoral success, see, Eg., Herbert E. Alexander, *Financing Politics: Money, Elections and Political Reform* (1992); *Money and Politics in the United States* (Michael J. Malbin ed. 1984); David B. Magelby & Candice J. Nelson, *The Money Chase: Congressional Campaign Finance Reform* (1990); Frank J. Sorauf, *Inside Campaign Finance: Myths and Realities* (1990); Frank J. Sorauf, *Money in American Elections*, (1988); Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 Colum. L. Rev. 1160 (1994); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising*, 94 Colum. L. Rev. 1281 (1994).

[6] It is a fiction to ascribe the current regulatory scheme, which draws a bright line between contributions and independent expenditures, to Congress. Congress sought to regulate both contributions and expenditures in the 1974 Amendments to the 1971 Federal Election Campaign Act. This Court invalidated the expenditure regulations, while upholding the restrictions on campaign contributions. *Buckley v. Valeo*, 424 U.S. 1 (1976).

ARGUMENT

I. IN VIEW OF THE ENORMOUS FLOW OF "SOFT MONEY" CONTRIBUTIONS FROM CORPORATIONS, LABOR UNIONS AND WEALTHY INDIVIDUALS TO LOCAL POLITICAL PARTIES, THE SPENDING CEILING IMPOSED BY SECTION 441a(d) IS NECESSARY TO DEFEND THE INTEGRITY OF CONGRESS' DECISION TO RESTRICT CAMPAIGN CONTRIBUTIONS FROM SUCH DONORS TO CANDIDATES FOR FEDERAL OFFICE

Congressional efforts to regulate campaign financing are designed to insulate candidates and elected officials from financial arrangements that risk the reality or appearance of *quid pro quo* corruption or bribery. See *Buckley*, at 24; *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985). See generally David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum. L. Rev. 1369 (1994); Daniel H. Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 Hofstra L. Rev. 301 (1989). An integrated set of regulations governing the disclosure,[7] source,[8] and

[7] Controversial parties may obtain an exclusion from the disclosure rules on a showing of a "reasonable probability of threats, harassment, or reprisal". *Brown v. Socialist Workers' 74 Campaign Committee*, 459 U.S. 87 (1982).

[8] Business corporations have been prohibited from contributing to federal election campaigns since the passage of the Tillman Act in 1907. For the history of Congressional efforts at campaign finance reform, see, *Congressional Quarterly, Dollar Politics*, (3rd ed. 1982). Compare, ~~*Austin*~~ *v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (upholding state ban on independent expenditures by business corporations in contested elections), with *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (invalidating state ban on corporate expenditures in connection with ballot initiative). Non-profit corporations whose sole purpose is the advancement of ideas are free from expenditure restrictions, *FEC v. Massachusetts Citizens' for Life, Inc.*, 479 U.S. 238 (1986), but remain subject to contribution regulations. *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981).

amount[9] of campaign contributions attempts to limit the ability of business corporations, labor unions, and wealthy individuals to exercise, or to appear to exercise, "corrupt" undue influence over candidates or elected officials. *Buckley* at 26-27. Most importantly, corporations and labor unions are flatly barred from contributing funds directly to any candidate for federal office, and wealthy individuals are severely limited in the amounts they can contribute.

The spending ceiling imposed by Section 441a(d) is necessary to maintain the integrity of the existing ban on contributions from corporations, labor unions and wealthy individuals. Although one would not know it from petitioner's brief, local political parties like the Colorado Republican Party have been, and remain, the recipients of hundreds of millions of dollars in so-called "soft money" contributions from precisely those interests - business corporations, labor unions, and wealthy individuals - that are precluded from contributing directly to candidates for federal office.[10] In the absence of the spending ceiling imposed by section 441a(d), even if the soft money itself could be kept from "bleeding" directly into federal campaigns - a dubious proposition - soft money donors, barred from exercising direct influence over federal candidates, will inevitably exercise enormous indirect

[9] The Federal Elections Campaign Act imposes a $1,000 ceiling on individual contributions to a federal candidate in a primary and a general election; a $5,000 ceiling on contributions to a multi-candidate PAC; and a $25,000 annual ceiling on an individual's total federal contributions. The Act's contribution ceilings were upheld in *Buckley* (individual), and *California Medical Ass'n* (PAC).

[10] For a summary of 1995 "soft money" contributions to political parties, see *Report of the Center for Responsive Politics* (March 4, 1996). Description of soft money giving patterns in the text are drawn from the Center's Reports, which are, in turn, based upon an analysis of reports filed with the Federal Election Commission.

influence over federal candidates by influencing the local party's decision as to which federal candidates are to receive money from the party.

"Soft money", a euphemism for political contributions falling outside the purview of federal regulation, began modestly in 1980 as a means of funding local voter registration drives. In recent years, however, soft money contributions to local political parties have cascaded into a flood of dollars from corporations, labor unions, and wealthy donors that threaten the integrity of the Act's federal contribution restrictions. For example, during 1995, the Democratic and Republican Parties raised almost $60 million dollars in "soft money" contributions, predominantly from contributors who would have been barred from contributing to a federal election campaign. The Democratic Party raised $25 million dollars; the Republican Party raised $33.7 million dollars. 82% of Republican soft money came from business corporations. 55% of Democratic soft money came from business corporations, with an additional 36% coming from wealthy individuals. Thus, in 1995, business corporations donated more than $41 million dollars to local political parties. According to the Center for Responsive Politics, the leading 1995 soft money contributors were:

Democrats		Republicans	
Dirk Ziff	$380,000	Phillip Morris	$992,149
AT&T	$313,000	RJR Nabisco	$696,450
Seagram & Sons	$285,000	AT&T	$370,000
MCI	$279,750	American Financial .	$330,000
Miramax Films .	$276,000	Atlantic Richfield . .	$322,175
B.L. Schwartz (Loral Corp.) .	$240,000	News America	$265,000
Lazard Frères . .	$235,000	Brown & Williamson	$265,000

Democrats		Republicans	
Dream Works . .	$225,000	Archer-Daniels-Midland	$225,000
Anheuser-Busch	$215,250	Time-Warner	$250,000
Laborers' Union	$205,000	Textron	$218,700
MCA	$200,000	NYNEX	$206,405
Connell Co. . .	$200,000	Paine Webber	$195,000
Phillip Morris .	$199,000	Forstmann, Little	$185,000
Atlantic Richfield . . .	$185,500	Reliance Group	$180,000
Milberg, Weiss .	$180,000	Seagram & Sons	$175,000
Johnny Chung (Automated Intelligent Systems) . . .	$175,000	Blue Cross	$161,203
Stallion USA . .	$150,000	Limited, Inc.	$160,000
RJR Nabisco . .	$126,250	Pfizer	$156,000
IBEW	$125,000	US Asia	$150,000
Entergy Corp. .	$121,500	Pilgrims' Pride	$150,000

With particular relevance to this case, in 1991-92, the Colorado Republican Party received a soft money contribution of $465,000 from a single wealthy donor. See *Soft Money in the States: A Survey of Contributions in the 1992 Elections* (Center for Responsive Politics 1994).

While, under current law, the proceeds of such "soft money" contributions may not be transferred by a political party directly to federal candidates,[11] the existence of an enor-

[11] Taken to an extreme, petitioner's constitutional argument would permit local political parties, as First Amendement entities, to act as conduits for soft money to federal candidates in unlimited amounts.

mous pot of "soft money" just below the federal waterline poses two distinct threats to the integrity of the federal regulatory scheme. First, a significant danger exists that soft money will "bleed" directly into federal campaigns,[12] giving the corporate, labor and wealthy individual donors precisely the dangerous leverage that Congress sought to prevent. Even when it can be accurately traced, soft money is often used to finance political activities that benefit both the local and the national ticket. Partisan get out the vote drives, and partisan voter registration drives are the two most obvious examples. The close link between soft money and national elections is demonstrated by the recurrent upsurge in soft money activity in states with close national elections in the five weeks prior to the election.

More importantly, soft money donors will inevitably exercise, or appear to exercise, significant influence over the local political parties they bankroll, including influence over which federal candidates receive money from the local party. A candidate or elected representative who must cater, or appear to cater, to soft money corporate, labor or wealthy donors in order to receive money from a local party, however lawfully those funds were raised, will find herself in precisely the moral predicament that Congress sought to avoid when it banned direct contributions from corporations and labor unions, and restricted contributions from the wealthy. *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981).

Current law, however inadequately, seeks to minimize the influence exercised by soft money donors over federal elections by imposing spending ceilings designed to limit the amounts that local parties can funnel to federal candidates.

[12] National and local political parties are permitted to transfer soft money back and forth in an often bewildering series of transactions that are, often, difficult to disentangle. Local parties are permitted to assign their local 441a(d) spending quota to the national party, which, in turn either re-assigns, or expends the sum. *FEC v. Democratic Senatorial Campaign*, 454 U.S. 27 (1981).

Under section 441a(d), the amounts that local parties can disburse in aid of a federal candidates are deemed too small to pose a credible threat to candidate independence. If, however, petitioners are successful in destroying the 441a(d) ceiling, the soft money loophole will further erode - and eventually destroy - the existing regulatory system. Corporate, labor, and wealthy individual contributors seeking to maximize their political influence will simply: (1) contribute generously to local parties under the soft money loophole; (2) encourage local parties to raise substantial hard money funds from legitimate sources; and (3) exercise significant influence over which federal candidates receive the unlimited financial support from the party. Such a scheme simply replicates the reality and appearance of undue influence by corporations, labor unions and wealthy donors that Congress sought to avoid in the first place. In *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981), this Court upheld the $5,000 limit placed on contributions by unincorporated associations to multi-candidate PAC's, ruling that unlimited contributions to multi-candidate PAC's would raise the specter of real and apparent undue influence because a donor could use the PAC's to circumvent direct restrictions. Precisely the same considerations apply to petitioner's effort to permit local political parties to make unlimited contributions to candidates for federal office. Candidates seeking the unlimited largesse of a local political party, however carefully that largesse is raised, will be forced to curry favor with the corporate, labor and wealthy donors who bankroll the local party, creating the very climate of undue influence that led Congress to limit their ability to contribute directly.[13]

[13] *Amicus* takes no position on two significant issues. The question of whether "express advocacy" or mere "electioneering activity" is necessary to trigger the Act is a close question to which, *amicus* suggests, deference to the FEC's expertise is appropriate. Nor does *amicus* take a position on whether the proposed standard of "electioneering activity", as narrowed by the FEC's Advisory Regulation dated March 31, 1995, is unduly vague or overbroad.

(footnote continued)

In a world in which the soft money loophole did not exist, local political parties might well play a more constructive role in the financing of federal elections. But local political parties cannot have it both ways. They cannot choose to be awash in cash from soft money donors who are forbidden to contribute to a federal election campaign, while simultaneously demanding to be permitted to disburse limitless amounts of money to candidates for federal office.

II. EXPERIENCE TEACHES THAT THE ANALYTICAL FRAMEWORK AND FACTUAL ASSUMPTIONS OF *BUCKLEY v. VALEO* ARE INADEQUATE TO DEAL WITH THE CONSTITUTIONAL ISSUES RAISED BY CONGRESSIONAL EFFORTS TO REGULATE CAMPAIGN FINANCING.

A. The Conventional *Buckley* Analysis

Conventional analysis of efforts to regulate campaign financing follows a well-trodden path established twenty years ago by *Buckley v. Valeo*, 424 U.S. 1 (1976). First, spending money to influence an election is equated with speech, triggering full First Amendment protection. Second, a bright-line distinction is drawn between independent expenditures and contributions (or coordinated expenditures). Independent expenditures on behalf of a candidate are equated with pure speech and accorded the highest level of First Amendment protection. Contributions to candidates are viewed as one level removed from direct speech, triggering a somewhat lower level of free speech protection. Both expenditures and contributions are, however, deemed sufficiently imbued with First Amendment protection to require a showing of compelling state interest as a condition of regulation.

Finally, *Amicus* believes that the outcome of this case should not turn on whether the activity at issue herein is labelled a "contribution", an "independent expenditure", or a "coordinated expenditure". Whatever the activity is ultimately called, it involves financial support that risks the very undue influence by corporate or wealthy donors that Congress sought to prevent. For the reasons set forth in Point II, *infra*, *amicus* urges the Court to refrain from deciding campaign financing cases on the basis of conclusory labels that mask underlying reality.

Next, potential state interests are canvassed to determine whether they justify regulation. The risk of actual, or perceived, "corruption" or bribery qualifies as sufficiently compelling to justify regulation of financial transactions posing a significant risk of "corruption". The inherent inequality of using wealth to influence elections is recognized as a legitimate governmental concern, but, under a conventional reading of *Buckley*, limits on expenditures (as opposed to contributions) designed to enhance equality have been deemd constitutionally forbidden, unless they are a condition of receiving public financing. Significantly, *Buckley* makes no attempt to canvass other potential state interests that might justify campaign regulation.

Direct contributions to candidates (or coordinated expenditures) are deemed to pose a sufficiently high risk of the reality, or appearance, of *quid pro quo* corruption to justify disclosure rules, stringent ceilings, and prohibitions on corporate and labor contributions. See *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) (upholding $5,000 ceiling on contributions from unincorporated associations to multi-candidate political action committees). But see *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) (invalidating $250 ceiling on contributions to committees formed to support or oppose ballot initiatives); *Meyer v. Grant*, 486 U.S. 414 (1988) (invalidating ban on paid petition circulators for ballot initiative).

Independent expenditures, however, no matter how large and no matter how they are perceived by the public, are deemed to pose little or no risk of quid pro quo corruption, and thus are exempt from regulation[14], with the significant

[14] *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) (invalidating ceiling on independent campaign expen-

exception of business corporations, which are constitutionally entitled to expend corporate funds on ballot initiatives, but may be banned from making independent expenditures on behalf of candidates in contested elections. Compare *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (upholding ban on corporate independent expenditures in support of state and local candidates), with *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (invalidating ban on corporate expenditures in connection with ballot initiative). Candidate expenditures are, likewise, virtually exempt from regulation, unless the regulations are a condition of accepting public financing.

B. The Artificial Nature of the Distinctions Drawn by *Buckley*, and the Unfortunate Practical Impact of the Opinion

With the benefit of twenty years of experience, several of the attenuated distinctions and factual assumptions central to *Buckley* appear questionable. Most importantly, the critical distinction between contributions and independent expenditures that forms the core of the opinion appears to rest on two questionable props. First, the *Buckley* Court's assertion that an independent expenditure on behalf of a candidate is a more direct form of speech than a campaign contribution to a candidate was highly controversial in 1976, and remains unpersuasive today. The open espousal of political association that characterizes a campaign contribution is fully as First Amendment-intense as the private expenditure of funds. It verges on the arbitrary to draw a distinction of constitutional dimensions between Congress' ability to regulate contributions and expenditures based on an alleged difference in the relative intensity of the communicative experience. Thus, *amicus* believes that the justification for regulating campaign con-

ditures by PAC's); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (invalidating ban on corporate campaign expenditures by non-profit corporation "akin to [a] voluntary political association").

tributions is not their lesser First Amendment status, but the existence of a compelling interest in preventing the reality or appearance of improper *quid pro quo* relationships.

Similarly, after twenty years of experience, the assertion in *Buckley* that contributions pose a significant risk of *quid pro quo* corruption, while independent expenditures, no matter how large, or how perceived, pose no real or apparent danger of *quid pro quo* corruption, seems naive. When an extremely wealthy "supporter" publicly expends immense resources on behalf of a candidate, the perception and reality is that the candidate is as publicly beholden to the donor as if the money had flowed as a direct contribution. While relatively small independent expenditures pose only a minor risk of undue influence (as do relatively small direct contributions), when the amounts reach significant proportions, twenty years of experience with PAC's and large independent donors reveals that the perceived potential for corruption and undue influence is fully present when independent expenditures become a significant component of a candidate's financial armory.

Moreover, the assertion in *Buckley* that all expenditures, no matter how large, are fully - and equally - protected at every dollar level appears to have been abandoned by the Court in the context of corporate expenditures. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). In *Austin*, the Court upheld a Michigan ban on independent expenditures by corporations in state and local elections, noting that large aggregations of corporate wealth capable of influencing elections are the result of economic transactions bearing no relationship to politics. If, under *Austin*, elections can be insulated against an avalanche of corporate wealth accumulated in non-political contexts, it is unclear why huge concentrations of wealth accumulated in equally non-political contexts by partnerships, trusts and individuals cannot be similarly subjected to regulation to prevent the unfair skewing of the electoral process in favor of the rich. In short, once the non-political genesis of large aggregations of wealth becomes

a criteria for regulation, *amicus* does not believe that the Court can draw a principled constitutional line at the corporate form.

Finally, the conventional *Buckley* analysis has led to several unfortunate practical results. It has demonstrably magnified the importance of personal wealth. Recent experience indicates that extremely wealthy candidates enjoy an artificial electoral advantage under *Buckley*, since they are freed from contribution regulations, while remaining free to expend immense personal wealth that is unavailable to other candidates.[15] It has also magnified the role and influence of special interest contributors organized as PAC's. Most unfortunately, the *Buckley* analysis, by exempting expenditures from regulation, has inadvertently increased the fund-raising pressures on already vulnerable candidates by limiting the money supply, while doing nothing about the demand. Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising*, 94 Colum. L. Rev. 1281 (1994).

In economic terms, *Buckley* restricts the money supply by appropriately restricting contributions that risk "corruption", but does nothing to limit the demand for money, since expenditures are constitutionally insulated from regulation. The result is a Madisonian nightmare, with candidates forced into a never-ending courtship of prospective donors who openly contribute on the basis of economic self-interest, creating the worst possible climate of actual and perceived undue influence.

Perhaps the most troubling result of *Buckley* has been the erosion of faith in the moral integrity of the democratic process. Contrary to the stated assumption of *Buckley* that unregulated expenditures would not lead to a widespread appearance of "corruption", voters lacking the financial ability to buy a candidate's attention or loyalty perceive themselves as powerless and betrayed. No decision of government is viewed with trust, since every decision is permeated by the appearance, if not the reality, of undue influence.

[15] In the context of the 1996 Presidential campaign, Steve Forbes has candidly conceded that, but for the restrictions imposed by federal law, he would have underwritten the campaign of Jack Kemp.

C. Enriching the *Buckley* Analysis

In order to shore up *Buckley*'s analytic framework, and to correct its unfortunate practical consequences, *amicus* urges the Court: (1) to re-assess in the light of experience the relationship between unregulated campaign expenditures and the loss of confidence in the democratic process; and (2) to add a third governmental interest to the corruption and equality concerns considered in *Buckley*—a compelling societal interest in defending an elected official's capacity to make decisions that are, and are perceived to be, the result of principled judgment, and not merely an effort to please an influential constituent.

Elected officials play two crucial roles in the American democratic experiment. On the one hand, we expect them to function as faithful agents, anxious to learn constituent preferences, and to respond to them. In one sense, the requirement that candidates raise money from the electorate in order to contest an election is some guaranty that an elected official will be a faithful and attentive agent of her constituents. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum. L. Rev. 1369 (1994). Such an argument assumes, of course, that all constituents have a fair opportunity to "monitor" their representatives by imposing financial pressure on them. In the real world, the economic monitoring function excludes the poor and much of the middle class, leaving the economic monitoring pressures to the wealthy, and to organized special interests. The inherent inequality of using money as the principal method of monitoring elected representative has led to calls for public funding of elections, and underlies the Circuit's perceptive recognition that concerns over equality should play a greater role in our thinking about campaign financing. Jamin Raskin

and John Bonifaz, *The Constitutionality Imperative and Practical Superiority of Democratically Financed Elections*, 94 Colum. L. Rev. 1160 (1994); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 Colum. L. Rev. 1204 (1994).

On the other hand, we ask elected representatives to rise above self-interested agency status on occasion and to function as fiduciaries in search of the common good. See generally, Edmund Burke, *Address to the Electors of Bristol* (1774) (reprinted in Conor Cruise O'Brien, *The Great Melody* (1992) at 74-75; Abraham Lincoln, in the *Lincoln-Douglas Debates* (1854), described in David Herbert Donald, *Lincoln*, at 173-178. See also *Federalist* 10 (Madison).

Unfortunately, the *Buckley* Court's analysis has led to the glorification of the money-driven agency model, and the weakening - perhaps the extinction - of the fiduciary model. No more compelling interest exists in American life, amicus suggests, than the re-awakening of the fiduciary model of representative democracy. Legislation designed to permit elected representatives to find an occasional respite from the viselike pressure imposed by a relentless need to please self-interested donors would restore the reality and perception of an independent, conscientious search for the common good. The genius - and challenge - of our democratic institutions has been to demand both agency and fiduciary behavior from our elected representatives, often at the same time. But *Buckley*, with its singleminded emphasis on regulating contributions but not expenditures, makes it almost impossible for the fiduciary model to flourish, while significantly advantaging the agency model.

Discussion of democratic theory in the United States revolves around two models: public choice and public interest.[16] The public choice model argues that the process of legislation is driven exclusively by selfish efforts to maximize individual self-interest. Legislation, according to many public choice theoreticians, is simply the outcome of an auction among interested persons seeking to maximize short-term economic advantage. Altruism is non-existent; claims to seek the common good are either cynical strategies, or incoherent acts of self-delusion. Under public choice, the legislative process is reconceived as a market, with legislators acting as the sellers of a product paid for in votes, campaign contributions, honoraria and free vacations. The buyers are economic interest groups seeking wealth transfers. Sadly, *Buckley* is a roadmap to a public choice world.

The competing model, public interest, flows from James Madison's Federalist No. 10, where Madison warns against "factions" and envisions the growth of a pluralist polity in which self-interested actors are occasionally persuaded to agitate and legislate for the common good.[17] Public interest theory, associated in recent years with the revival of civic republicanism,[18] argues that an optimum solution to many problems can be found that will benefit everyone, if only some of us can be persuaded to trade short-term economic advantage for long-term collective good. Altruism plays an important role; arguments about the common good take center stage, and play an important (not merely a cosmetic) role in the legislative process. Under a public interest model, the democratic process is conceived as an exercise in remedying

[16] For a description of the public interest model, see Posner, *Theories of Economic Regulation*, 5 Bell J. Econ & Mgmt Sci. 335, 36 (1974). It is described in Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. Pa. L. Rev. 1, 31-50 (1990).

For examples of public choice analysis, see, e.g. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation*, 76 Va. L. Rev. 265 (1990). It is described in Shaviro, *supra*, at 64-71.

[17] See Kelman, *Why Public Ideas Matter* in *The Power of Public Ideas* (R. Reich, ed. 1988); Sunstein, *Interest Groups in American Law*, 38 Stan. L. Rev. 29 (1985)

[18] See Sunstein, *Beyond the Republican Revival*, 97 Yale L. J. 1539 (1988).

market failure, with individual acts of selfishness viewed as part of a "prisoner's dilemma" to be redeemed by collective acts in furtherance of the common good.

Both public choice and public interest make claims to be *the* way of analyzing the democratic process, both descriptively and normatively. *Amicus* believes that each has important kernels of insight. Public choice reminds us of the undeniable role that self-interest plays in the democratic process; public interest calls us to rise above parochialism in search of common goals. Ideally, we should structure the democratic process to get the best of both worlds by encouraging self-interested players to make their wishes - and their influence - known to legislators, while assuring that legislators remain capable, on occasion, of living up to Madison's ideal of a search for the common good. Unfortunately, the conventional reading of *Buckley* locks our political system into a public choice model, while making it almost impossible for a public interest perspective to flourish. The Court should recognize that a compelling governmental interest exists in fostering both the reality, and the perception, of the capacity of elected representatives to make principled choices driven by a belief in the common good in order to permit both models to function with the necessary vigor.

CONCLUSION

For the above-stated reasons, the judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Alternatively, the Court may wish to remand for the development of a fuller evidentiary record on the role of Section 441a(d) as a brake on the influence of soft money donors on federal elections, and the continuing viability of the factual assumptions underlying *Buckley v. Valeo*.

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